



Facsimile 202 457-6315
www.pattonboqqs.com

FILED/ACCEPTED Kevin J. Martin
2024-05-15 15:45
kmartin@pattonbagg.com

Federal Communications Commission
Office of the Secretary

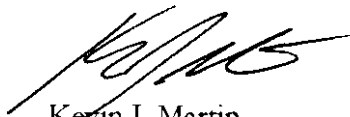
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Two copies of the CWA Petition to Deny and two copies of the Highly Confidential version of the Economist's Report are being simultaneously delivered to Vanessa Lemmé, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, and a Highly Confidential version is being sent to the Submitting Parties through counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'KJ Martin', written over a horizontal line.

Kevin J. Martin

Counsel for Communications Workers of America

Enclosures

Before the
Federal Communications Commission
Washington, DC 20554

ORIGINAL
FILED/ACCEPTED

JUN 21 2010
Federal Communications Commission
Office of the Secretary

In the Matter of)

Applications for Consent to the)
Transfer of Control of Licenses)

General Electric Company,)
Transferor,)

To)

Comcast Corporation,)
Transferee)

MB Docket No. 10-56

**PETITION TO DENY OR IN THE ALTERNATIVE IMPOSE CONDITIONS
COMMUNICATIONS WORKERS OF AMERICA**

**Kevin J. Martin
Mark C. Ellison
Jennifer A. Cetta
Patton Boggs, LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-5635**

**George Kohl
Debbie Goldman
Communications Workers of America
501 Third Street, NW
Washington, D.C. 20001
(202) 434-1194
dgoldman@cwa-union.org**

***Counsel for Communications Workers
of America***

EXECUTIVE SUMMARY

CWA represents 700,000 workers in communications, media, airlines, manufacturing and public service, including workers of General Electric, NBCU and Comcast. CWA members are residents of NBC broadcast station and Comcast cable service areas and are viewers and subscribers to the same, as well as online video services.

The proposed transaction, as currently structured, poses considerable harm to CWA members as workers and consumers. It will result in the loss of jobs, erode employee rights and undermine living standards in the communications and media industries.

After transaction is completed, Comcast will be able to provide its 23.5 million cable subscribers, 16.3 million broadband customers and 7.8 million telephone subscribers with an unprecedented supply of programming. Already, Comcast viewers have access to the company's 18 cable channels that include USA Network, Versus, Golf, and G4 Media, Inc., along with 10 owned and operated Regional Sports Networks ("RSNs"). NBCU brings the NBC Television Network, which broadcasts 5,000 hours of television programming to 234 affiliated stations across the country, including 10 NBC owned-and-operated television stations reaching 27 percent of U.S. television households. NBC also comprises national broadcast network Telemundo and 15 Telemundo owned-and-operated stations; 32 online video properties that include Hulu.com, CNBC.com and NBCOlympics.com; at least 11 wholly owned cable networks CNBC, NBC Sports, MSNBC, Syfy, Bravo, Oxygen and USA Network and additional cable networks in which they have an additional interest, and a vast film library from Universal Studios and Focus Features. NBCU not only boasts the nation's oldest broadcast network, it has the leading business news network, CNBC. NBC owns the rights to arguably the most desirable lineup of national sporting events in the industry, including NBC Sunday Night Football, the

premier primetime NFL game of the week, the U.S. Open Championship, The Ryder Cup, the President's Cup, the Kentucky Derby, the Preakness Stakes, Wimbledon, the French Open and the Stanley Cup Final.

Comcast's acquisition of NBCU would give the combined company even greater power to raise cable rates, exercise block competition in the video marketplace, impair independent networks, eliminate jobs and degrade employee rights.

Comcast-NBCU also will have the ability to withhold critical must-have programming from its competitors, including national and regional sports programming and local broadcasting. The Commission has recognized that the ability to provide a video service offering is an integral component of being able to upgrade your network for broadband capability. Thus, limiting the ability to offer a competitive video service may delay or prevent the deployment of broadband.

Comcast-NBCU will also have the ability to impair the emerging online video market. By tying access of online video to traditional cable subscriptions, Comcast-NBCU can slow the growth of Internet TV and protect Comcast's market power in the supply of cable television service.

The availability of premium content online increases the value of broadband subscription to consumers. Thus, the availability and ease of accessing video online is also an important means to encourage the deployment and adoption of broadband.

Because the proposed merger would result in considerable harm to CWA members, the Commission should deny the Application or in the alternative impose the following conditions:

1. Workers should not lose their jobs as a result of the transaction. Comcast-NBCU should commit to ensuring that employees will retain their current jobs and that their employment rights

will be protected. Further, Comcast-NBCU should commit to maintain or grow employment levels after the transaction.

2. For employees who have elected to have representation rights, the merged entity will respect and recognize the collective bargaining status of its employees that existed prior to transfer and will take no action to undermine that status.

3. Employees with collective bargaining agreements who will now work the new entity will have their existing contract recognized by the new franchise owner.

4. The merged entity will take no action to undermine the rights of employees who seek union representation.

5. Comcast-NBCU should be compelled to sell its affiliate networks to MVPDs on an a-la-carte basis—i.e. Comcast should be barred from tying its marquee networks (an NBC affiliate, an RSN, or Versus) to its lesser programming.

6. Comcast-NBCU should be explicitly prohibited from offering bulk discounts, which are frequently used to impair new entrants. With respect to the NBCU O&O affiliates: (1) Comcast should be compelled to enter binding baseball style commercial arbitration for disputes over retransmission consent; and (2) rival MVPDs should be allowed to carry the NBC affiliate during arbitration.

7. To address the potential abuse of market power in the online video marketplace, Comcast-NBCU should be barred from tying access to online content to the purchase of a cable video subscription.

8. Comcast-NBCU should be barred from conditioning carriage on an independent network's agreement not to replicate video programming online.
9. Within one year of the acquisition, the combined company should be compelled to divest NBCU's partial ownership in Hulu.com. Given the pivotal role that Hulu.com plays as an aggregator of network television programming on the Internet.
10. The Commission should apply the program access protections to OTT video providers, and it should extend those protections in the event that Comcast-NBCU's affiliated programming is ported or replicated online.
11. Comcast-NBCU should be barred from tying the purchase of the new entity's cable television service to its set-top box.
12. To discourage Comcast-NBCU from discriminating in its carriage decisions on the basis of affiliation, the Commission should refine its current program-carriage adjudication process: to include an expedited complaint process; a baseball-style arbitration process, and a swift timetable for resolution of complaints.

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**PETITION TO DENY OR IN THE ALTERNATIVE IMPOSE CONDITIONS
COMMUNICATIONS WORKERS OF AMERICA**

I. INTRODUCTION

The Communications Workers of America (“CWA”), pursuant to Section 309(d) of the Communications Act of 1934, as amended,¹ and section 73.2584 of the Commission’s Rules,² hereby petitions to deny or in the alternative impose conditions in the above-captioned application for the transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“General Electric”) to Comcast Corporation (“Comcast”)³ (collectively, the “Applicants”).

¹ 47 U.S.C. § 309(d) (2006 & Supp. III).

² 47 C.F.R. § 73.3584 (2009).

³ *Commission Seeks Comment on Applications of Comcast Corporation, General Electronic Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, DA 10-47 (rel. Mar. 18, 2010) (hereinafter, the “Application” and the transaction referred to as the “Transaction,” the “Combination” or the “Merger”).

As discussed more fully below, the approval of the Applications would result in a number of public interest harms and would create numerous anticompetitive effects. The Applicants have failed to demonstrate by a preponderance of the evidence that the proposed transactions will serve the public interest, convenience, and necessity.

The Application before the Commission to combine the nation's largest cable and Internet distribution company with the nation's leading newsroom and production company would create a media conglomerate of unprecedented scope and scale that would challenge the Commission's obligation to safeguard the public interest. Comcast's acquisition of NBCU would give the combined company even greater power to raise cable and advertising rates, exercise gatekeeper control over traditional and new media programming and distribution, eliminate jobs, and degrade employee rights. Because the proposal would diminish diversity and competition among media voices and would thus harm the public interest, the Commission should deny the Application.

After the complex series of transactions are completed, this will be a media company of unprecedented size and scope. Comcast will be able to provide its 23.5 million cable subscribers,⁴ 16.3 million broadband customers and 7.8 million telephone subscribers⁵ with an unprecedented supply of affiliated programming. Already, Comcast viewers have access to the company's 18 cable channels⁶ that include USA Network, Versus, Golf, Sprout, E! Entertainment Television, Inc., and G4 Media, Inc., along with 10 owned and operated Regional

⁴ See DSL Reports, April 28, 2010, <http://www.dslreports.com/shownews/Comcast-Continues-To-Beat-Telcos-In-Broadband-Growth>.

⁵ Comcast Reports First Quarter 2010 Results, Press Release, April 28, 2010, available at <http://www.cmcsa.com/earningdetails.cfm?QYear=2010&QQuarter=1>.

⁶ Application at 17-21.

Sports Networks (“RSNs”) in seven of the 10 largest television markets.⁷ NBCU brings to the table the NBC Television Network, which broadcasts 5,000 hours of television programming to 234 affiliated stations across the country, including 10 NBC owned-and-operated television stations reaching 27 percent of U.S. television households.⁸ NBC also comprises national broadcast network Telemundo and 15 Telemundo owned-and-operated stations that reach 93 percent of U.S. Hispanic viewers; 32 online video properties that include Hulu.com, CNBC.com and NBCOlympics.com; at least 11 wholly owned cable networks CNBC, NBC Sports, MSNBC, Syfy, Bravo, Oxygen and USA Network and additional cable networks in which they have an additional interest, including (the top-rated cable channel), and a vast film library from Universal Studios and Focus Features. NBCU also boasts the nation’s oldest broadcast network, NBC, and the leading business news network, CNBC. NBC also owns the rights to arguably the most desirable lineup of national sporting events in the industry, including NBC Sunday Night Football, the premier primetime NFL game of the week, the U.S. Open Championship, The Ryder Cup, the President’s Cup, the Kentucky Derby, the Preakness Stakes, Wimbledon, the French Open and the Stanley Cup Final.⁹ The proposed merger of such scale and scope would have a significant anticompetitive impact on the entire communications landscape and should be denied. In the alternative, the Commission should impose significant remedial conditions outlined below and described more fully herein.

⁷ Comcast Sports Group – Televising Over 2,400 Live Sporting Events Annually, Available at <http://www.comcast.com/medialibrary/1/1/about/pressroom/documents/PressKit.pdf>.

⁸ NBC Universal Company Overview, available at http://www.nbcuni.com/About_NBC_Universal/Company_Overview/.

⁹ *Id.*

II. CWA HAS STANDING TO PETITION TO DENY THE APPLICATION

CWA is a labor organization whose members have standing as parties in interest to petition the Commission to deny the Applications, or in the alternative, to impose conditions, in the Comcast-NBCU merger.¹⁰ As set forth below, CWA satisfies the constitutional threshold elements to establish standing, viz., CWA's members will suffer an injury-in-fact that is traceable to the proposed merger/license transfer applications, and a grant of this Petition to Deny would likely redress CWA's injury.¹¹

CWA represents 700,000 workers in communications, media, airlines, manufacturing and public service, including workers of General Electric, NBCU and Comcast. CWA members are residents of NBC broadcast station and Comcast cable service areas and are viewers and subscribers to the same, as well as online video services. Therefore, CWA "can assert a possible injury to a legally protected interest... as 'spokesman' for a station's entire audience."¹² Such standing exists when faced with an injury caused by the grant of an application that seriously and adversely impacts the public interest.

The proposed transaction, as currently structured, poses considerable harm to CWA members as workers and consumers. As discussed herein, it will result in the loss of jobs, erode employee rights and undermine living standards in the communications and media industries. Although the Applicants claim that the proposed transaction will preserve and create jobs,

¹⁰ 47 U.S.C. § 309(d), *See Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966) ("*United Church of Christ*").

¹¹ *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) (citing *Jersey Shore Broad. Corp. v. FCC*, 37 F.3d 1531, 1535 (D.C. Cir. 1994)); *Liberty Prods., a Ltd. P'ship WOXL-FM, Biltmore Forest, NC, Letter*, 20 FCC Rcd 11987, 11992 (July 7, 2005); *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972) (organizations have standing of their members).

¹² *Huddy v. FCC*, 236 F.3d 720, 722 (D.C. Cir. 2001) (citing *United Church of Christ*, 359 F.2d at 1002).

Comcast-NBCU has not made any concrete, verifiable and enforceable commitments regarding jobs. Further, the proposed merger will result in higher prices and fewer choices for consumers of cable, broadcast, and online video services. Because the proposed merger would result in considerable harm to CWA members, denial of the applications presently before the Commission will likely redress CWA's imminent injuries. Alternatively, imposing certain conditions on the merger, discussed, further herein, would go far to alleviate CWA members' injuries.

III. PUBLIC INTEREST REVIEW

Pursuant to Section 310(d) of the Communications Act, the Commission weighs the potential public interest harms of the proposed merger against the potential public interest benefits to insure that, on balance, the transfer serves the public interest, convenience, and necessity.¹³ The Commission's public interest analysis is not limited to a traditional anti-trust review, but includes the "broad aims of the Communications Act," which include, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of

¹³ See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9817 ¶ 1 (2000) ("AT&T-MediaOne Order"); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No.02-70, Memorandum Opinion and Order, 17 FCC Rcd. 23,246, 23,255 ¶ 26 (2002) ("AT&T-Comcast Order"); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd. at 18031 ¶ 10 (1998) ("WorldCom-MCI Order"); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("SBC-Ameritech Order").

voices is made available to the public, assessing whether the merger will affect the quality and diversity of communications services and analyzing the impact on employment.¹⁴

The Commission also considers whether a proposed transaction is likely to lead to public interest harms with respect to employment practices.¹⁵

The Supreme Court has emphasized the Commission's duty and authority to promote diversity and competition among media voices based on the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹⁶ The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Thus, the Court concluded that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is an "important government interest."¹⁷ As the Commission noted in the *AOL-Time Warner Order*, its evaluation must consider, among other things, whether the proposed transaction will further the statutory goals of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and

¹⁴ See *AT&T-Comcast Order*, ¶ 27; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6556 ¶ 22 (rel. Jan. 22, 2001) ("*AOL-Time Warner Order*"); *WorldCom-MCI Order*, 18031 at ¶ 9.

¹⁵ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006); see also *WorldCom-MCI Order* at 213 (considering the impact of that merger on employment); see also *SBC-Ameritech Order* at 567 (citing SBC's commitment to "improving service quality by hiring more employees"); *Puerto Rico-GTE Order* at ¶ 57 (noting that employee commitments are a merger-related public interest benefit).

¹⁶ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (citing *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)). See *AT&T-Comcast Order*, ¶ 27.

¹⁷ See *Turner Broadcasting*, 512 U.S. at 663.

services to the public, and ‘promot[ing] competition in the delivery of diverse sources of video programming...’¹⁸

The Applicants bear the burden of proving, by a preponderance of the evidence, that the transfer will advance the public interest.¹⁹ In its public interest review, the Commission employs a balancing test to determine whether the potential public interest benefits outweigh the potential public interest harms. “As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest.”²⁰ The analysis focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger.²¹

Finally, the Commission has recognized the need for regulatory intervention through specific merger conditions if necessary “to compensate in markets where sufficient competition is lacking.”²² The Commission has recognized that combining assets may allow the merged entity to “consolidate that power,” and to use its market power to “create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.”²³

¹⁸ 47 U.S.C §§ 521(4) and 523(a). *See AOL-Time Warner Order*, 6556 ¶ 22.

¹⁹ *See SBC-Ameritech Order*, 14737, ¶ 48; *AT&T-TCI Order*, 3169-70, 15; *WorldCom-MCI Order*, 18031, ¶ 10 n.33.

²⁰ *See AT&T-MediaOne Order*, ¶ 154 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14824, ¶ 256).

²¹ *Id.*

²² *See AOL-Time Warner Order*, 15-16.

²³ *See AT&T-Comcast Order*, 28.

IV. THE PROPOSED TRANSACTION POSES CONSIDERABLE HARM TO EMPLOYEES

Comcast's proposed acquisition of NBCU will likely result in the loss of good jobs, the erosion of employee rights, and undermine living standards in the communications and media industries. Although the Applicants claim that the proposed transaction will preserve and create jobs, Comcast-NBCU has not made any concrete, verifiable and enforceable commitments regarding jobs and respect for workers' rights.

The new venture will be financially weaker the day after Comcast's acquisition is approved. As part of the transaction, NBCU debt will increase by approximately \$8 billion.²⁴ This debt burden will deprive the merged entity of the resources to maintain, much less to grow, its workforce to ensure adequate staffing levels to provide quality service and programming and career opportunities for employees. The result will lead the new entity to cut costs and jobs.

This is a familiar pattern in the media industry, where companies over-leverage to pay for a merger and then cut jobs to improve their balance sheets, only to discover that they lack the staff to produce quality news and entertainment programming. This erosion in program quality leads to declining audience share, less revenue and continued cost-cutting. Absent firm commitments from Comcast and NBCU to maintain or grow their current employment levels, there is no reason to believe that the joint venture will not follow this pattern. With national unemployment hovering at 10 percent, this corporate transaction's impact on jobs runs counter to the Administration's American Recovery and Reinvestment Act job stimulus programs that have sought to increase employment in the communications industry in particular through broadband investment.

²⁴ Comcast Corporation, *SEC Form 10-K (2009 Annual Report)*, p. 22, filed Feb. 23, 2010, for the period ending Dec. 31, 2009.

Historically, the communications and media sectors have served as a good source of stable jobs, due in large measure to more than 70 years of collective bargaining. The proposed joint venture would undermine advancements in labor standards for workers in these sectors.

Among the factors that the Commission considers as part of its public interest inquiry is whether the applicant for a license has the requisite “citizenship, character, financial, technical and other qualifications.”²⁵ Comcast lacks the requisite citizenship and character qualifications based upon its systematic campaign to undermine its employees’ rights under that National Labor Relations Act to union representation and to bargain collectively over wages, benefits and working conditions. Nowhere has this been more apparent than when Comcast has attempted to eliminate worker organizations at companies that it has acquired.

In 2002, when Comcast merged with AT&T Broadband, it sought to eliminate the existing unions. At the time, CWA represented about 5,000 cable employees at AT&T Broadband. During the review process, Comcast told union members and local franchise authorities that it would respect the collective bargaining agreements between AT&T Broadband and union members. Comcast leaders pledged to continue the fair labor management practices the parties had established.

Comcast failed to honor its commitment. Most of the organized units that Comcast acquired from AT&T Broadband were in the process of negotiating a first contract. Comcast delayed bargaining for years, denied workers wage and benefit improvements provided to non-union employees, and supported decertification elections. Comcast refused to reach agreement

²⁵ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, (“*Thirteenth Annual Report*”) MB Docket No. 06-189, rel. Jan. 16, 2009.

on a first contract in 16 of the organized units that it acquired from AT&T.²⁶ This disrespect for employees' right to collective representation does not comport with the Commission's citizenship and character qualifications.

There are other examples of Comcast's abusive labor practices. In the San Francisco Bay and Detroit metropolitan areas, where CWA also represents Comcast employees, Comcast has shifted work to non-union contractors earning lower wages, thereby reducing secure jobs in areas greatly affected by unemployment.²⁷ In Detroit area, all the installation work is done by subcontractors, and in the Port Huron, MI, bargaining unit, all the installation work and 90 percent of the service work is done by subcontractors. As a result, the permanent workforce in Detroit has been cut in half since 2004 (from 80 employees in 2004 to 38 today), and is down to 12 employees in Port Huron.

The National Labor Relations Board ("NLRB") has repeatedly cited Comcast for violations of labor law. In 2005, an Administrative Law Judge for the NLRB ruled that Comcast had illegally fired two workers for union activities during an organizing drive in 2002 and 2003. The judge required Comcast to reinstate the workers with back pay and ruled against the company on 11 unfair labor practices for violating the National Labor Relations Act by "coercing ... threatening ... and interrogating" employees.

In 2002, Comcast illegally fired two Pittsburgh area technicians who were union supporters. Arbitrators ordered that the workers be reinstated with back pay and compensation the following year. And in 2001, Comcast fired a union supporter in Hialeah, Florida, who was

²⁶ American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications*, 2004 (available at <http://www.americanrightsatwork.org/publications/general/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html>).

²⁷ Non-union cable workers' compensation trails unionized telecom employees by an average of \$13,000 a year.

called to active duty with the Navy in Guantanamo Bay. The company refused to allow the employee to return to work after he completed his military service. The NLRB concluded that Comcast erred and directed the company to reinstate the worker. When Comcast refused, the NLRB issued a complaint. The employee ultimately accepted a cash settlement.

CWA represents Comcast workers in the Pittsburgh area. Initially, Comcast actively resisted its employees' efforts to gain union representation, and workers were forced to go through four union elections in five years, three of which were decertification attempts by the company, before they were able to establish a union voice. Since then, Comcast and CWA have negotiated a collective bargaining agreement there, indicating that change and the development of a more positive company-union relationship is possible.

Comcast competes against unionized telecommunications companies for voice, broadband and video services and its anti-labor practices have the effect of eroding industry wage and benefit standards.

By contrast, NBCU has a long-standing history of collective bargaining with CWA and other unions. If the Commission approves Comcast's acquisition of NBCU, Comcast would take control of labor relations, thereby expanding its ability to put downward pressure on workers' rights and community living standards.

Absent firm commitments from Comcast and NBCU to maintain or grow current employment levels, there is no reason to believe that the Comcast-NBCU joint venture will not eliminate jobs, thereby impacting the quality of news and entertainment programming. As a result, the Commission must ensure that employees will retain their current jobs and that the new entity will recognize the collective bargaining status of its employees that exists prior to the transfer. The Commission should also condition the proposed transaction on assurances that

employees with collective bargaining agreements who will become employees of the new entity will have their existing contract recognized by the new owner and that the new owner will take no action to undermine that status – or the scope of the bargaining units.

V. THE PROPOSED TRANSACTION WILL RESULT IN ANTICOMPETITIVE HARM IN TODAY'S VIDEO MARKETPLACE

The combination of Comcast, the nation's largest multichannel video programming distributor, and NBCU, a leading video programmer would create a single vertically integrated entity with unprecedented market power to increase cable rates, impair independent networks, block competition in the video marketplace and reduce jobs.

There already is too little competition in the video marketplace already, as evidenced by the rising cable rates that consumers pay year after year. The FCC estimates that from 1995 to 2008, the price of expanded basic service grew at three times the rate of inflation -- from \$22.35 to \$49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period.²⁸ Indeed, cable's share of MVPD subscribers exceeds 75 percent in 52 out of the 210 Designated Market Areas ("DMAs").²⁹ The FCC also has concluded

²⁸ *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 ¶ 2, Chart 1 (2009), provided as Attachment A.

²⁹ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, FCC MB Docket Nos. 07-29, 07-198, 22 FCC Rcd 17,791, 17,827-28, n. 277 (rel. Oct. 1, 2007) ("Tying Order"), appeal docketed, *Cablevision Systems Corp. v. FCC*, no. 07-1425 (D.C. Cir. Filed Oct. 19, 2007). These include two of the top 50 most-populated DMAs, Philadelphia and Hartford-New Haven, where Comcast has more than 70 percent of the market share; *see also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket. No. 06-189, Thirteenth Annual Report, (rel. Jan. 16, 2009) ("Thirteenth Annual MVPD Report"), ¶ 27 (noting that while the number of subscribers to

that “[i]ncumbent cable operators are still by far the dominant force in the MVPD business, with ... the ability to impose steadily rising prices.”³⁰ A combined Comcast-NBCU would have greater incentive and ability to engage in anti-competitive practices such as forced bundling that would raise consumers’ cable rates. As Dr. Singer explains in his declaration, the proposed transaction significantly increases the potential for anticompetitive bundling, as the new tying product would be significantly stronger for Comcast in the seven markets where a Comcast RSN and NBC O&O affiliate overlap. And in markets served by a Comcast RSN but not served by an NBC O&O affiliate, including Sacramento, Baltimore, and Detroit, Comcast can now tie NBC’s other network programming (for example, Syfy or Oxygen) to a Comcast RSN—a tying strategy that was not available to NBCU.³¹

In addition to these anticompetitive harms, Comcast also will have the ability to withhold from, or delay the licensing of critical must-have programming to, its competitors, including national and regional sports programming and local broadcasting. Finally, the Commission has recognized that the ability to provide a video service offering is an integral component of being able to upgrade one’s network for broadband capability.³² Thus, limiting the ability to offer a competitive video service may delay or prevent the deployment of broadband.

basic and premium cable service declined in 2005, premium cable service subscriptions and subscriptions to digital video service increased.)

³⁰ *In the Matter of Exclusive Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate developments*, Report and Order and Further Notice of Proposed Rulemaking FCC MB Docket No. 07-51, 22 FCC Rcd 20,235, 20,251 ¶ 32 (rel. Nov. 13, 2007) (“MDU Order”), petition for reh’g denied *Nat’l Cable & Telecomm. Ass’n v. F.C.C.* 567 F.3d 659 (DC Cir. 2009).

³¹ See Declaration of Hal J. Singer at 14 ¶ 13, provided as Attachment B (“Singer Declaration”).

³² *MDU Order* at 20,2345 ¶¶19, 20 (citing *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television and Consumer Protection Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC

A. Forced Bundling Raises Competitors' Costs and Cable Rates

Today, competing video distributors are often forced to purchase large bundles of channels that they and their customers do not want.³³ Following the merger, Comcast will have more premium content and will have the ability to bundle its less desirable cable channels with must-have NBC programming to secure higher rates for and more favorable placement of its programming. This forced bundling will raise other video providers' costs, and those added costs translate into higher cable rates for consumers.

This anticompetitive practice is not new. In fact, the Commission has explicitly recognized the problem of tying arrangements.³⁴ Tying arrangements leave MVPDs with a dilemma: they must either refuse the tied programming package and potentially go without must-have programming, or they can agree to the tying arrangement and purchase programming that neither they nor their customers want.³⁵ The Commission noted that "the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network."³⁶ Specifically, in past merger reviews, the Commission has recognized and addressed

Rcd 5101, 5126 ¶ 51(2006) *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (D.C. Cir. 2008) for the finding that broadband deployment and entry into the MVPD business are "inextricably linked.")

³³ See *Tying Order* at 17862 ¶ 119 (noting complaints about the "practice of programmers requir[ing] carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming.")

³⁴ *Id.* at ¶ 120.

³⁵ *Tying Order. supra.*

³⁶ *Id.*

the harms that such “tying” practices cause.³⁷ When the Commission considered the DirectTV-News Corp. merger, it agreed that the “transaction [could] enhance News Corp.’s incentive and ability to persuade competitors to carry its affiliated programming.”³⁸ Only by imposing conditions on the merger did the Commission find that it remedied this potential harm.³⁹

Tying arrangements are particularly problematic for small rural operators and new video competitors with a smaller subscriber base. Because Comcast and NBC give bulk discounts, they charge themselves and other large MVPDs less than they charge small and rural carriers on a per subscriber basis, raising the costs for cable subscription for customers of rural operators and new video entrants.

Such impediments to competition drive up consumers’ cable bills. In every iteration of the FCC Cable Price Reports, the FCC has found that the effect of overbuilder entry on cable prices is significant. In 2005, the Commission wrote that incumbent cable prices “are 17 percent lower where wireline cable competition is present.”⁴⁰ This finding is consistent with FCC cable price survey findings over the past few years, which are presented below in Table 3. This table demonstrates the extent to which incumbents demand higher average cable prices in non-competitive areas than they do in competitive areas.

³⁷ *Gen. Motors Corp. & Hughes Elec. Corp., Transferors & The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 593 ¶ 271 (2003) (“*NewsCorp Order*”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment, MM Dkt. No. 92-266, released Dec. 27, 2006, ¶ 2.

TABLE 3: FCC-ESTIMATED EFFECT OF OVERBUILD COMPETITION ON
INCUMBENT CABLE EXPANDED BASIC PRICES, 2002-2008

Date	Average Overbuilt Area Cable Price	Average Non-Competitive Area Cable Price	Difference	
			Nominal	Percentage
January 2002	\$31.01	\$36.21	\$5.20	16.8%
January 2003	\$32.83	\$39.11	\$6.28	19.1%
January 2004	\$34.00	\$41.18	\$7.18	21.1%
January 2005	\$36.79	\$43.77	\$6.98	19.0%
January 2006	\$40.24	\$45.53	\$5.29	13.1%
January 2007	\$42.77	\$47.49	\$4.72	11.0%
January 2008	\$45.04	\$49.97	\$4.93	10.9%
<i>Average</i>	\$37.53	\$43.32	\$5.80	15.4%

Sources: FCC Cable Price Report (2004) Attachments 8-9; FCC Cable Price Report (2005) Attachment 2, FCC Cable Price Report (2008) Attachments 2, 2-a, 2-b.

In January 2009, the FCC noted that “cable prices decrease substantially when a second wireline cable operator enters the market.”⁴¹

Many companies are trying to compete with incumbent cable operators, investing significant resources to build out their networks and enter the video marketplace. This merger would provide Comcast/NBC with the incentive and ability to block or limit that competition, and block or limit the investment and jobs that accompany those efforts. As competitors’ costs increase, those companies trying to compete will invest less in building out their networks and hire fewer people. As a result of this proposed merger, Comcast-NBCU will have the market power to stifle competitive entry by new video operators, yielding fewer companies competing to provide traditional cable video services, fewer choices and higher prices for consumers, slower deployment of broadband and lost jobs from these potential competitors.

⁴¹ Report on Cable Industry Prices, MM Docket No. 92-266, ¶ (rel. Jan. 16, 2009) (“Cable prices decrease substantially when a second wireline cable operator enters the market.”)